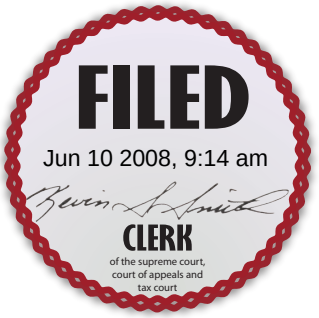

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IN THE
COURT OF APPEALS OF INDIANA

LORETTA BALLENTINE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 34A05-0712-CR-723
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable Stephen M. Jessup, Judge
Cause No.34D02-0501-FD-32

June 10, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a guilty plea, Loretta Ballentine appeals her three-year sentence for theft, a Class D felony. Ballentine raises two issues, which we restate as whether the trial court abused its discretion in finding aggravating circumstances and whether her sentence is inappropriate given the nature of the offense and her character. Concluding any abuse of discretion amounted to harmless error and Ballentine's sentence is not inappropriate, we affirm.

Facts and Procedural History[1]

On January 27, 2005, Loretta Ballentine entered a department store, placed several items in a shopping cart, and left the store without making any attempt to purchase the items. One of the store's security officers stopped Ballentine outside the store and requested that she return to the store with him. Ballentine initially followed the security officer, but then fled. Officers apprehended Ballentine in a nearby apartment complex. The approximate value of the stolen merchandise was six hundred dollars.

On January 31, 2005, the State charged Ballentine with theft as a Class D felony. On February 9, 2006, the State and Ballentine entered into a plea agreement. On May 1,

[1] We discern the facts from the police reports attached to the probable cause affidavit. Ballentine stipulated to the facts as stated in these reports at her guilty plea and sentencing hearing. Ballentine failed to include a statement of the facts relating to the offense in her appellate brief. Instead, Ballentine identified only that she was arrested for theft and pled guilty to the offense. We direct counsel to Appellate Rule 46(A)(6), requiring an appellate brief to "describe the facts relevant to the issues presented." As Ballentine is challenging her sentence, the statement of facts clearly should include a description of the offense.

2006, the trial court rejected this plea agreement.[2] On September 27, 2006, the State and Ballentine entered into another plea agreement, under which Ballentine agreed to plead guilty to the charge, and sentencing would be left to the trial court. Although the trial court initially rejected this plea agreement when Ballentine failed to appear for the plea hearing, it ultimately accepted the plea after re-scheduling the hearing.

At the sentencing hearing, the trial court found no mitigating circumstances, and ordered a sentence of three years, all executed. The trial court noted Ballentine's criminal history, that she had been arrested twice after committing the instant offense, and that she had failed to appear at the previous hearing. Ballentine now appeals.

Discussion and Decision[3]

I. Aggravating Circumstances

In her appellate brief, Ballentine neither cites authority nor makes a cogent argument as to how the trial court abused its discretion. Therefore, she has waived this issue. See Smith v. State, 822 N.E.2d 193, 202-03 (Ind. Ct. App. 2005) (recognizing that a party waives an issue by failing to "provide adequate citation to authority and portions of the record"), trans. denied.

However, in the interest of justice, we choose to address the issue as best we can. It appears Ballentine is raising a Blakely[4] argument. See Appellant's Brief at 6 ("At no

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[2] The probation officer who compiled the pre-sentence investigative report recommended that the trial court reject the plea agreement, which called for a sentence of two years, with six months executed and the remainder suspended to probation.

[3] Ballentine's appellate brief fails to set out the applicable standard of review. We admonish Ballentine's counsel to comply with Indiana Appellate Rule 46(A)(8)(b) ("The argument must include for each issue a concise statement of the applicable standard of review.").

time did the defendant herself admit to these Court determined aggravators nor did she ever waive her right to dispute any determination of aggravating factors or agree to have those aggravators imposed in consideration of an enhanced sentence."). As Ballentine's case is governed by the presumptive sentencing scheme,[5] Blakely applies to her case. See Duncan v. State, 857 N.E.2d 955, 959 (Ind. 2006).

We recognize that the trial court mentioned two arrests that occurred after Ballentine committed the instant offense and noted that Ballentine had failed to appear at a previous hearing. One of these arrests resulted in a conviction, but the other charge was dismissed. Blakely bars consideration of the charge that was dismissed. See Robertson v. State, 871 N.E.2d 280, 287 (Ind. 2007) ("Blakely prohibits enhancement based on . . . subsequent arrests and charges that had not yet resulted in convictions."). We will assume, without conclusively deciding, that the trial court was also prohibited from considering Ballentine's failure to appear in the instant case.

"Even where a trial court improperly relied upon certain aggravators, a sentence enhancement may be upheld if other valid aggravators exist." Chupp v. State, 830 N.E.2d 119, 126 n.8 (Ind. Ct. App. 2005). Here, the trial court also identified Ballentine's criminal history as a reason for imposing its sentence. Blakely does not

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[4] Blakely v. Washington, 542 U.S. 296, 301 (2004) (holding that a defendant has a right to have "any fact that increases the penalty for a crime beyond the prescribed statutory maximum" found by a jury beyond a reasonable doubt (quoting Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)).

[5] The current advisory sentencing scheme replaced the presumptive sentencing scheme on April 25, 2005. Weaver v. State, 845 N.E.2d 1066, 1070 (Ind. Ct. App. 2006), trans. denied. Because Ballentine committed the instant offense prior to this date, the presumptive sentencing scheme applies to her case. See Gutermuth v. State, 868 N.E.2d 427, 431 n.4 (Ind. 2007).

prohibit a trial court from considering prior convictions. Davis v. State, 835 N.E.2d 1087, 1088 (Ind. Ct. App. 2005). Given that Ballentine had accumulated twenty-five prior convictions, and that most of these convictions involved theft, forgery, or receiving stolen property, the trial court was well within its discretion to order a fully-executed maximum sentence based solely on Ballentine's criminal history. See Bryant v. State, 841 N.E.2d 1154, 1156 (Ind. 2006) (explaining that a criminal history's weight "is measured by the number of prior convictions, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability"). We conclude that the trial court's consideration of Ballentine's two arrests and her failure to appear was harmless error. See Cotto v. State, 829 N.E.2d 520, 525 (Ind. 2005) (recognizing that this court may "affirm the sentence if the error is harmless").

II. Appropriateness of Ballentine's Sentence

When reviewing a sentence imposed by the trial court, we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). We have authority to "revise sentences when certain broad conditions are satisfied." Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005). When determining whether a sentence is inappropriate, we recognize that the presumptive sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). We will examine both the nature of the offense and the defendant's character, see Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied,

and will look to any factors appearing in the record, Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied. The burden is on the defendant to demonstrate that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Ballentine makes no argument regarding the nature of the offense.[6] From what we can glean from the record we see little that renders the instant offense either more or less egregious than a typical theft.

In regard to Ballentine's character, we recognize that Ballentine pled guilty. We also recognize that the State does not appear to have dropped any charges or otherwise reduced Ballentine's potential punishment in exchange for this plea. However, there appears to be substantial evidence of Ballentine's guilt, as several store security guards witnessed Ballentine steal the merchandise and police officers arrested her while she was trying to escape. Cf. Primmer v. State, 857 N.E.2d 11, 16 (Ind. Ct. App. 2006) (recognizing that the significance of a guilty plea may be reduced "if there was substantial admissible evidence of the defendant's guilt"), trans. denied. Still, Ballentine's guilty plea comments favorably on her character. We also note that Ballentine had been employed for five and a half months at the time of sentencing.

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[6] Ballentine's brief contains the subheading, "Considering the Nature of the Offense." Appellant's Br. at 7. However, under this subheading, Ballentine discusses only a case that has been vacated. See Appellant's Brief at 7 (citing Campbell v. State, 820 N.E.2d 711 (Ind. Ct. App. 2004), trans. granted, opinion vacated, 831 N.E.2d 743 (Ind. 2005)). We also note that Campbell involved analysis of a sentence for two counts of attempted murder and burglary, and struggle to discern the (vacated) case's relevance to the issue at hand. Moreover, under this heading, Ballentine does not discuss the nature of the offense, and discusses only Ballentine's criminal history, claiming that "a large number of the case [sic] listed show 'DISMISSED' and should not, [sic] properly be used as an aggravating situation to support enhanced or executed sentences." Appellant's Br. at 7. We point out that although three cause numbers were dismissed, twenty-five convictions remain. We also point out that aggravating circumstances are not required to support executed sentences.

However, as discussed above, Ballentine has an extremely lengthy criminal history. Especially troubling is that fifteen of her prior convictions are for the crime of theft, the instant offense. See Hale v. State, 875 N.E.2d 438, 446 (Ind. Ct. App. 2007) (concluding a maximum sentence for dealing cocaine was appropriate and noting that the defendant had numerous drug-related convictions and had been on parole for dealing cocaine sixty-one days prior to committing the instant offense), trans. denied; Ashba v. State, 816 N.E.2d 862, 867-68 (Ind. Ct. App. 2004) (affirming a maximum three-year sentence for an OWI where the defendant had at least seven prior alcohol-related convictions). In sum, we cannot conclude that Ballentine has met her burden in persuading this court that her sentence is inappropriate.

Conclusion

We conclude that any error in the trial court's finding of aggravating circumstances was harmless and that Ballentine's sentence is not inappropriate.

Affirmed.

BAKER, C.J., and RILEY, J., concur.